SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 919

EDITH BOARDMAN COBB, ET AL.,
Petitioners

v.

FRANK GRAHAM JOHNS, JR., ET AL.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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February, 1969

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PRELIMINARY STATEMENT

This is a case involving the issue whether an adopted child is entitled to take under two wills which leave property to the "issue" of his adoptive mother. The first will was executed in 1922, two years before appellee's adoption, this being the will of his adoptive mother's grandmother. The second will was executed in 1944, when appellee was 22 years old, this being the will of his adoptive mother's aunt. Each will establishes a testamentary trust, the income of which is payable to four life beneficiaries, including the adoptive mother, and to their "surviving issue" *per stirpes*. Upon termination, the trusts are to be divided among the then surviving issue of each of the life beneficiaries, *per stirpes*. Because the adoptive mother is dead, the adopted son claims a share under such trusts as her "issue." The family chart, appearing at page 24a

of the Appendix to the Petition for Writ of Certiorari, contains the essential facts with respect to heirs.

The United States Court of Appeals for the District of Columbia Circuit held that, in the absence of an intention to exclude adopted children, the adopted child should be included and share in the wills as "issue" of his mother. *Johns* v. *Cobb*, 402 F. 2d 636 (D. C. Cir. 1968).

QUESTION PRESENTED

The sole question before this Court is whether, in the circumstances, this Court should consider and pass upon a decision of the United States Court of Appeals for the District of Columbia Circuit which solely declares a rule of law local to the District of Columbia.

STATEMENT

The material facts are undisputed. They appear in the Joint Appendix which was filed with the Court of Appeals, are designated as a part of the transcript of record here, and are summarized at pages 3 and 4 of the Petition for Writ of Certiorari.

REASONS FOR DENYING THE PETITION

Petitioner does not allege the existence of a federal question but, apparently, urges that the Court below has decided an important question in conflict with the applicable local law, so as to call for an exercise of this Court's power of supervision as contemplated by Rule 19(b) of this Court.

Petitioner fails to point out where the holding below, namely that absent a showing of a contrary intent a testatrix will be presumed to have intended to include an adopted child, differs from any prior adjudication on analogous facts. For example, throughout this proceeding, respondent here has urged that under law adopted chil-

dren must be included within a class of remaindermen, absent a contrary intent, and absent the use of adoption as a device to cut off remainders.

The decision below is not in conflict with applicable law, is a matter of local concern to the District of Columbia, and concerns a question which is of a type not normally considered by this Court.

The instant case concerns testatrices of the District of Columbia disposing of property located in the District, and concerns facts unlike any heretofore presented to District of Columbia Courts.[1] On the material facts the District of Columbia Courts might decide, as a matter of local law applying to local situations, either way and, "when the choice of the Court of Appeals of the District of Columbia in local matters between legal conclusions seems nicely balanced, we do not interfere." *Fisher* v. *United States*, 328 U.S. 463 (1946). This policy has consistently been followed. See *Griffin* v. *United States*, 336 U. S. 704 (1949); *Miller* v. *United States*, 357 U. S. 301 (1958).

Petitioners, in urging a presumption of exclusion, rely upon cases which are factually inapposite. *Shoemaker* v. *Newman*, 65 F. 2d 208 (D. C. Cir. 1933) held that an adopted child inherits only from its adoptive parents, and does not inherit through the foster parents from direct or collateral kin. The will in *Shoemaker* was probated in 1891 and, thus, execution of the will and the death of the testator were prior to the first District adoption statute,[2] and during a period when adoption was not recognized at common law. *Noreen* v. *Sparks*, 204 F. 2d 56 (D. C. Cir. 1953), where testator executed the will in 1879 and died in 1880, is subject to the same infirmity. Moreover, *Shoe-*

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[1] The only analogous case is *Platt* v. *National Metropolitan Bank*, C.A. No. 1297-59 (D.D.C. not rep't'd), where the will concerned "children" and summary judgment was granted in favor of the adopted child.

[2] D.C. Code § 395 (1901).

maker, was decided eleven years after execution of the first will here involved and could not have influenced the first testatrix. *Noreen* was concerned with "child or descendant" in a will executed before the first District adoption statute. It was decided after the death of each testatrix here and could not have been relied upon by either. Here, the infant was adopted at a time when D. C. Code § 395 (1901) was in force and which declared that an adopted child became "an heir at law . . ., the same as if such child was born to such petitioner."

Allen v. *American Security and Trust Company*, Equity No. 55,624 (D.D.C. 1935), affirmed and reversed in part on other issues, *sub nom Hepburn* v. *Winthrop*, 83 F. 2d 566 (D. C. Cir. 1936), held that the word "issue" could not include adopted children for the reason that the children were adopted subsequent to the death of the testator, which is not the case here. *Allen* v. *Reed* 17 F. 2d 666 (1927) itself states that "issue" is not inflexible.

Petitioners, in urging a presumption of exclusion, have cited below such cases as *Pennington* v. *Citizens Fidelity Bank and Trust Co.* (Ky. 1965) 390 S.W. 2d 671, where a husband, age 74, was adopted by his wife, age 71, in order to take under a will leaving a remainder to the wife's "children." The husband's claim under the will was denied. Consistently, petitioners now cite cases such as *National City Bank of Cleveland* v. *Mitchell*, 13 Ohio App. 2d 141, 234 N.E. 2d 916 (1968), where the adoption took place two years *after* the settlor's death. In *Merson* v. *Wood*, 202 Va. 485, 117 S.E. 2d 661 (1961), the Court held that a 24 year old woman, adopted by the son of testatrix 37 years after her death, was not an "heir" of the son within a will devising land to the son for life "and if he dies without heirs" remainder to three children of testatrix. The Court, in *Merson*, found that "the appellant was adopted solely for the purpose of permitting her to take the property . . ." (117 S.E. 2d at 664). In *Newsom* v. *Scott*, 200 Va. 833, 108 S.E. 2d 369 (1959), the adopted

son was 20 years of age at adoption, which was 32 years after testator's death, and, had the adopted son prevailed, he would have defeated, entirely, the rights of testator's grandchildren.

The differing factual situations are clear. On the one hand, where there is a good faith adoption prior to the testator's death and absence of any contrary intent in the will, the testator is held to have intended that the adopted child would come within the class of remaindermen when that class is described as "children," "lawful issue," *et cetera.* On the other hand, when there is an adoption purposefully designed to cut off existing rights of remaindermen, the claim of the adopted child must fail. Compare *Edmonds* v. *Tice* (Ky. 1959) 324 S.W. 2d 491 and *Wilson* v. *Johnson* (Ky. 1965) 389 S.W. 2d 634.

The assertion that the holding of the Court below effected a confiscation of vested property rights and thus created a constitutional issue is without merit. It begs the very question at issue by assuming that no vested property right existed in any one other than petitioners. The Court below held to the contrary. Thus, under local law there could not have been any diminution of any interest of petitioners.

Petitioners erroneously assert that the Court below misapplied applicable statutes.[3] The proceeding below involved construction of wills, not construction or interpretation of statutes relating to inheritance. This is not a case of inheritance, but of construction of wills the makers of which were domiciled in the same jurisdiction, and the construction of which have no compelling effect upon other jurisdictions. Even if the statutes were involved, this Court has stated: "We will not ordinarily review decisions of the United States Court of Appeals which are based upon statutes so limited or which declare the com-

[3] D.C. Code § 395 (1901), D.C. Code § 16-205 (1951), D.C. Code § 16-222(a), 16-224, 16-225 (1961), D.C. Code §§ 16-312(a), 16-313, 16-315, 45-812, 45-823 (1967).

mon law of the District." *Del Vecchio* v. *Bonnie L. Bowers*, 296 U.S. 280, 285 (1935); *District of Columbia* v. *Pace*, 320 U.S. 698, 702 (1944).

The law declared by the Court below of a presumption of inclusion of adopted children within a class of remaindermen, absent a contrary intent, not only concerns a matter of law local to the District of Columbia, but is also clearly correct.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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